THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

FOREWORD

JUSTICE, JACKSON AND OTHERWISE

We drove to New England by way of Washington a couple of summers ago, stopping at the United States Holocaust Memorial Museum while we were there. The three of us became separated right away, my husband swept forward by a tour group that entered just after we stepped inside, and my son and I losing track of each other soon afterward.

I went on alone, and even though I had been to the museum before and knew what to expect, the next several hours were exhausting. You see there the worst of human nature. Then you round a corner and see something worse. And then something even worse.

I was drained by the time I approached the exhibits that focus on the end of the War. Reflecting anew on what had happened, fearing that it could happen again, I was by then soured on politics and power and diplomacy and war. Then I glimpsed an old black-and-white film flickering on a small display, and understood immediately why it was there. I cut through the crowd to the bank of screens, pulled a speaker to my ear, and—to my embarrassment—started to cry.

It was Robert Jackson. Standing at the podium in Nuremberg. Speaking in the formal, lawyerly, and unmistakably mid-twentieth-century American manner that sounds a little stiff and old-fashioned today, but sounded in that courtroom like the voice of the law itself. "Yes," I whispered fiercely as he spoke, and "exactly," and "this is who we are."

I stood there for a long time, listening to Justice Jackson describe the Allies' decision to take the Nazi leadership to trial instead of directly to the gallows as "one of the most significant

tributes that Power has ever paid to Reason,"[1] remind his audience that "the record on which we judge these defendants today is the record on which history will judge us tomorrow,"[2] and steadily restore my faith in the power of the law.

As I grow older, I think often of the men—ordinary men, most of them—who went off to war and ended up saving the world.[3] Their mission was grander than ours, they unquestionably braver than we. And of course none of us measures up to Robert Jackson. His mission, too, was grander than ours, his gifts greater, and the lawyering he did at Nuremberg more important than anything most of us will ever do. But the decency and commitment he brought to that work were in the best tradition of American law. And in the preservation of that tradition, we too have a part.

THE ISSUE

This issue includes a particularly winning first-argument essay, a concise survey of the ancient practices behind the modern appeal, an article tracing language from briefs into the opinions of the United States Supreme Court, another considering sua sponte actions on appeal, and a third discussing silent concurrences. All are, I think, worth your time.

AN UPDATE

After our last issue appeared, we received word from the Massachusetts Court of Appeals that the rule of *Lyons v. Labor Relations Comm'n*,[4] providing that "unpublished decisions of this court are not to be relied upon or cited as authority in unrelated

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1. ROBERT H. JACKSON, THE NÜRNBERG CASE 31 (1947).
2. *Id.* at 33–34.
3. Consider this, from the obituary of a World War II veteran who was awarded the Silver Star for saving the lives of his plane's pilot, co-pilot, bombardier, and navigator after a crash-landing in enemy-occupied China, and then leading them to safety: "Corporal Thatcher, both a gunner and flight engineer, later flew on bombing missions over Europe. He was discharged from the armed forces as a staff sergeant in July 1945. He worked as a letter carrier in Missoula after the war." Richard Goldstein, *David Thatcher, Part of Famed 1942 Doolittle Raid on Japan*, Dies at 94, N.Y. TIMES, June 22, 2016, at B15.
4. 476 N.E.2d 243, 246 (Mass. App. 1985), *rev'd on other grounds*, 492 N.E.2d 343 (Mass. 1986) (cited in David R. Cleveland, *Appellate Court Rules Governing Publication, Citation, and Precedential Value of Opinions: An Update*, 16 J. APP. PRAC. & PROCESS 257, 267 (2015)).

cases," was modified in *Chace v. Curran*[5] because the court's unpublished decisions "have become far more widely available and now routinely appear in the results of electronic research."[6] The *Chace* court held in consequence that an unpublished decision "issued after [February 25, 2008], may be cited for its persuasive value but . . . not as binding precedent."[7] We are happy to pass this information along to you.

NBM
Little Rock
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5. 881 N.E.2d 792 (Mass. 2008).
6. *Id.* at 794 n.4.
7. *Id.*